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Letter Ruling 87-7: Modular Homes

November 24, 1987

The New England Home Manufacturer's Council asked for guidelines on the application of the Massachusetts sales tax to a manufacturers sale of a modular home to a builder-dealer, who then sells the property to a consumer. The following facts describe sales practices in the industry.

Facts

A manufacturer constructs modular home sections in a factory and has labels attached to the modules that show they conform with the regulations of the State Building Code Commission. The manufacturer installs the electrical wiring and fixtures, the plumbing and plumbing fixtures, and any interior stairs. In addition, the manufacturer paints the interior, lays carpeting, and completes much of the trim. The manufacturer's employees, or a subcontractor working under the manufacturer's direct supervision and control, deliver the modules to the building site in a vehicle the manufacturer owns or leases. The manufacturer, or a Subcontractor working under the manufacturer's direct supervision and control, provides the machinery, equipment, and labor for transferring the modules onto a foundation prepared by the builder-dealer. The manufacturer's employees, or a subcontractor working under the manufacturer's direct supervision and control, level and align the modules, bolt them together, and support them with lally columns. Before turning over possession of the modules, which are affixed to realty, to the builder-dealer, the manufacturer, or a subcontractor working under the manufacturer's direct supervision and control, make the building weather-tight. The parties intend that title will not pass until the manufacturer completes the work on-site.

The builder-dealer does some finish work after the manufacturer's employees or subcontractors leave the site. The builder-dealer interconnects the plumbing and electrical systems of the modules and then connects these systems to the outside lines. It also does "finishing" work such as painting, carpeting, and trim work where the modules are joined.

Discussion

The determinative issue is whether building modules which are affixed to realty and made weather-tight by the manufacturer are tangible personal property or realty when sold to a builder-dealer, who then finishes off the project and sells it to consumers. we conclude that the building modules are realty when transferred in the transaction described below, see "Conclusion."

Massachusetts imposes a tax on sales at retail of "tangible personal property," G.L. c. 64H, § 2. A "sale" is any transfer of title or possession or both of tangible personal property. G.L. c. 64H, § 1(12)(a). It includes the transfer of title or possession of tangible personal property which has been produced to the special order of a customer. G.L. c. 64H, § 1(12)(e). "Tangible personal property" is "personal property of any nature consisting of any produce, goods, wares, merchandise and commodities...." G.L. c. 64H, § 1(15). Sales of realty are not subject to sales tax.

A discussion of the application of these principles to building contractors follows. Since the Massachusetts sales tax was enacted in 1966, the sales tax treatment of contractors and subcontractors in Massachusetts has closely followed the practice and policy in the state of Rhode Island. See *Ace Heating Service, Inc. v. State Tax Commission*, 371 Mass. 254, 257 n. 2 (1976).

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Rhode Island's Regulation C--Contractors and Subcontractors, R.I. ST. TAX REP. (CCH) p 63-820 et seq., distinguishes between a construction contract and a sales contract. A construction contractor constructs, reconstructs, alters, remodels, repairs, or improves real property. A retailer sells tangible personal property at an agreed price and may install a complete unit of standard equipment that requires no further fabrication but simply installation, assemblage., or service connections. A construction contractor is required to pay a sales or use tax on materials purchased for use in building construction as the consumer of these items. *Ace Heating Service, Inc.*, supra. A retailer who sells tangible personal property is required to collect the sales tax on the sales price. (R.I.) Regulation C, supra. The practice and policy of the Massachusetts Department of Revenue in this particular area is in accord with Rhode Island's Regulation C. See Letter Ruling 85-68. In a 1971 letter to the National Association of Building Manufacturers, the then Commissioner of this Department explained the Department's position on the application of the sales tax to the sale of modular homes. His example of a sale which would be treated as a construction contract is one where the manufacturer agrees to deliver and erect a building on the buyer's lot under a contract stating transfer of title or possession does not take place until the building is erected and weather-tight.

Support for treating modules affixed to realty as real property is found in Letter Ruling 82-120, in which no sales tax was collected on the sale of a mobile home affixed to realty. The letter ruling cited *Ellis v. Board of Assessors of Acushnet*, 358 Mass. 473 (1971), which concluded that a mobile home affixed to a concrete foundation is no longer considered tangible personal property but real property for the purposes of a real property taxation. Further, when the facts indicate the parties intend the property affixed to realty be treated as realty, such intention will be given weight by the courts in classifying the property. In re *United Chevrolet*, 21 Bankr. 934 (D. Mass. 1982).

The facts here are distinguished from those in Letter Ruling 85-42. In Letter Ruling 85-42 the dealer placed the modules on the foundation and thus clearly had possession before the modules were affixed to realty. Letter Ruling 85-42 held that the modules were tangible personal property, and that the manufacturer should collect a sales tax on the sale of the modules to the dealer. Here the manufacturer places the modules on the foundation.

Conclusion

In the past the Department has primarily looked at the facts to determine who affixes the property to realty. We conclude that where the facts are as follows, the sale of a modular home by a manufacturer to a builder-dealer is a construction contract for the sale of real property and is not subject to sales tax:

The manufacturer constructs modular home sections, with labels attached to show that the modules conform with the State Building Code Commission, in an off-site factory under a lump sum contract requiring delivery and installation by the manufacturer or a subcontractor under the direct supervision and control of the manufacturer.

The actual placement is accomplished solely by employees of the manufacturer or a subcontractor working under the direct supervision and control of the manufacturer. The manufacturer completes delivery and installation by affixing the modules to the foundation, by aligning the modules, bolting them together, installing support columns, and making the building weather-tight. The manufacturer is solely responsible for the correct installation of the building in accordance with its system approved by the Massachusetts Building Code Commission.

Employees or agents of the builder-dealer do not participate in transporting, transferring, attaching, erecting, or weather-proofing the building. Possession and risk of loss do not pass to the builder-dealer until delivery and installation is complete and the structure is affixed to realty and in weather-tight condition.

There is evidence that the parties intend that title shall pass after the modules are affixed to realty and delivery and installation are complete.

The builder-dealer connects plumbing and electrical systems, paints, lays carpet, and does trim work, and other work in accordance with the manufacturer's system approved by the Massachusetts Building Code Commission.

As a construction contractor, a domestic manufacturer must pay a sales tax on the materials used in the construction of the modules. A construction contractor is not entitled to a manufacturer's exemption from local property taxes under G.L. c. 59, § 5 (Sixteenth).

If the manufacturer is a foreign corporation engaged in the sale of real property in Massachusetts as described above, then as a construction contractor the manufacturer is responsible for payment of the use tax on the materials used in the construction of the modules. The foreign corporation must post a bond under G.L.c. 64H, s. 30A.

If the transaction between the builder-dealer and the manufacturer is not the same as the transaction described above, then the manufacturer may be treated as a retailer who must collect a sales tax on the sale price to the builder-dealer.

Very truly yours,
Stephen W. Kidder
Commissioner of Revenue
November 24, 1987
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